

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL P. BATTLE and U.S. POSTAL SERVICE,
POST OFFICE, Bell, CA

*Docket No. 02-634; Submitted on the Record;
Issued September 19, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS,
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly found that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

The Board's jurisdiction to consider and decide appeals from a final decision of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.¹ As appellant filed the appeal with the Board on January 31, 2002, the only decision before the Board is the Office's December 3, 2001 decision, denying appellant's request for reconsideration.

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).² The Office will not review a decision denying or terminating benefits unless the application for review is filed within one year of the date of that decision.³ The Office will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error by the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.⁴

On November 13, 1979 appellant, then a 24-year-old mailhandler, filed an occupational claim stating that he became aware he had a work-related psychoneurotic condition on September 29, 1979.

¹ *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.607(a); *see also Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁴ 20 C.F.R. § 10.607(b); *see Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

By decision dated October 8, 1982, the Office denied the claim, stating that appellant failed to establish the fact of work-related exposure and causal relationship of any work factors to his condition. On November 8, 1982 appellant requested an oral hearing before an Office hearing representative, which was held on May 23, 1983. By decision dated September 19, 1983, the Office hearing representative affirmed the Office's October 8, 1982 decision. By letter dated November 9, 1983, appellant requested reconsideration of the Office's decision. On January 4, 1984 the Office denied appellant's request for modification.

Subsequently, appellant submitted five claims, one dated December 29, 2000, for a recurrence of disability (Form CA-2a), stating that on October 10, 1979 he became aware that he sustained a nervous breakdown, "schizoaffective disorder, bipolar type" from stress and pressure from a supervisor and coworker at work and another claim (Form CA-2) dated November 1, 2000, for an occupational disease consisting of bipolar disorder occurring sometime in 1978 resulting from his being falsely accused of killing a coworker and harassment by his supervisor for not coming into work. Appellant filed another claim (Form CA-2a) dated November 1, 2000, for a recurrence of disability commencing in October 1987, in which appellant stated that he had "never been the same since [he] wasn't able to stay focus[ed] and do his work duty." On this form, appellant stated that his claim was filed in a timely manner, but as of September 9, 1999, he had new evidence regarding a ruling by a federal judge on an issue on which the Office based its denial of his claim. In another claim also dated November 1, 2000, for a recurrence of disability occurring in October 1978, appellant stated that he was denied workers' compensation because the Office said appellant used "pcp," which he never did and stated that the federal judge removed that information from his medical record. Appellant filed a claim dated December 29, 2001, for a recurrence of disability commencing October 10, 1979, (Form CA-2a) which was signed by his supervisor on January 16, 2001.

By letter dated March 15, 2001, the Office requested that appellant clarify the nature of the claims he had submitted and to submit the appropriate medical evidence.

By letter dated April 9, 2001, appellant requested that his old claim be reopened and submitted additional evidence including a decision by the United States Court of Appeals for Veterans dated November 23, 1999 and numerous progress notes and administrative documents related to his work performance.

By decision dated July 18, 2001, the Office denied appellant's claim, stating that appellant's claim for a recurrence of disability dated January 16, 2001, was filed with his agency and, therefore, his claim was not timely filed. The Office noted that appellant's last work exposure was August 21, 1982, prior to his retirement and the statutory time limit for filing his claim ended on August 21, 1985.

By letter dated July 22, 2001, appellant requested an oral hearing before an Office hearing representative.

By decision dated November 26, 2001, the Office hearing representative reversed the Office's July 18, 2001 decision, stating that the Office erred in finding appellant's claim was untimely. The Office hearing representative remanded the case, instructing the Office to treat

appellant's additional claims dated November 1 and December 29, 2000 and his April 9, 2001 letter as a request for reconsideration and address it appropriately.

By decision dated December 3, 2001, the Office stated that in accordance with the Office's November 26, 2001 decision, it was treating appellant's claim Form CA-2 dated November 1, 2000 as a request for reconsideration. The Office denied appellant's request, stating that appellant's November 1, 2000 request for reconsideration was filed more than a year after the Office's January 4, 1984 decision and, therefore, was not timely. Further, the Office found that appellant failed to present clear evidence of error.

The Board finds that the Office abused its discretion by not reviewing appellant's claim under 5 U.S.C. § 8128(a), as the one-year time limitation set forth in 20 C.F.R. § 10.607(a) had not yet begun to run pursuant to FECA Bulletin No. 87-40. 20 C.F.R. § 10.607(a) states in pertinent part:

"An application for reconsideration must be sent within one year of the date of the [Office] decision for which review is sought."⁵

FECA Bulletin No. 87-40 "Notification of One-Year Time Limitation for Reconsideration," states in pertinent part:

"Action:

"1. The attachment to this bulletin⁶ reflects the text to be used where the decision in dispute was issued prior to June 1, 1987 and the claimant's application for review is being denied based on insufficiency (*i.e.*, the claimant has not met the requirements of section 10.138(b)(1)(i) through (iii)). This text advises the claimant of his or her right to appeal the denial of application to ECAB and of the new one-year time limitation for obtaining merit review. This is the only situation in which this notice is to be used.

"2. A copy of the notice of the one-year time limitation must be placed in the case file along with the decision denying application. If a copy of the notice is not in the case file, the time limitation cannot be applied to a subsequent request for reconsideration.

⁵ On January 4, 1999 20 C.F.R. § 10.607(a) amended 20 C.F.R. § 10.138(b)(2).

⁶ The attachment to the Bulletin provides appeal rights to ECAB and the following:

"Notice:

Section 10.138(b)(2) of Title 20 of the Code of Federal Regulations, which concerns the reconsideration of a decision by the Office, provides that [the Office] will not review a decision denying or terminating a benefit unless the claimant's request for review is filed within one year of that decision. Therefore, for any decision issued prior to June 1, 1987, which included the right to reconsideration, a request for reconsideration of that decision will be denied if it is not made within one year from the date of this notice."

“3. Where the notice is released, the date of the notice is the date of the decision denying application and the one-year period begins the day after the date of that decision. The notice should be issued only once. Additional use of the notice in the same case would renew the one-year time limitation. Therefore, subsequent denials of application based on insufficiency of evidence should be accompanied only by the right to appeal to ECAB.”

The Office’s last merit decision in this case was issued on January 4, 1984 denying appellant’s request for modification. Subsequently, the Office determined that of the five claims appellant submitted dated December 29, 2000, three dated November 1, 2000 and another claim dated December 29, 2001, the November 1, 2000 claim constituted a request for reconsideration. By decision dated December 3, 2001, the Office denied appellant’s November 1, 2000 request for reconsideration on the grounds that it was not timely filed pursuant to 20 C.F.R. § 10.607(a).

The Board notes that the case record does not contain a copy of the notice required by FECA Bulletin 87-40 as a prerequisite for applying the one-year time limitation on a subsequent request for reconsideration. Since the notice is not in the case record, the one-year time requirement for requesting reconsideration of a claim does not apply in the instant claim and appellant’s reconsideration request cannot be found untimely under 20 C.F.R. § 10.607(a) and FECA Bulletin 97-40. The decision denying benefits was dated January 4, 1984. The Office set forth specific procedures to be followed for claims adjudicated prior to June 1, 1987 where there is a subsequent failure to satisfy the requirements of 20 C.F.R. § 10.607(a) and FECA Bulletin 97-40. The Office did not follow its own procedure in adjudicating appellant’s request for reconsideration.⁷ The refusal of the Office to reopen appellant’s claim for further consideration of the merits of his claim under 5 U.S.C. § 8128(a) on the basis that his request for reconsideration was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.607(a) constituted an abuse of discretion. The case must be remanded to the Office to act upon reconsideration of his claim.

⁷ *Charles E. Puff*, 48 ECAB 429, 431-32 (1997); *Harriet Halworth*, 41 ECAB 826, 831-33 (1990).

The December 3, 2001 decision of the Office of Workers' Compensation Programs is hereby reversed and the case remanded for further action consistent with this decision.

Dated, Washington, DC
September 19, 2002

Michael J. Walsh
Chairman

Alec J. Koromilas
Member

David S. Gerson
Alternate Member